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November 20, 2000

The Honorable Vernon A. Williams  
Office of the Secretary  
Surface Transportation board  
Case Control Unit  
ATTN: STB Ex Parte No. 582 (Sub-No.1)  
1925 K Street, NW  
Washington, DC 20423-1001

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Office of the Secretary  
NOV 20 2000  
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Public Record



RE: Ex Parte No. 582 (Sub-No. 1)

Dear Secretary Williams:

I am resubmitting ARC's comments in the Ex Parte 582 Sub-1 filing because our certificate of service was inadvertently omitted from the original filing, which complied with the November 17<sup>th</sup> comment deadline. Enclosed you will find the original comments, along with the completed certificate of service, and 25 copies of those items. You have already received a 3.5-inch IBM-compatible diskette containing an electronic copy of these comments. If there are any problems with this resubmission, please call me at 202-216-9270.

Sincerely,

*Diane C. Duff*

Diane C. Duff  
Executive Director

Enclosures

**ENTERED**  
**Office of the Secretary**

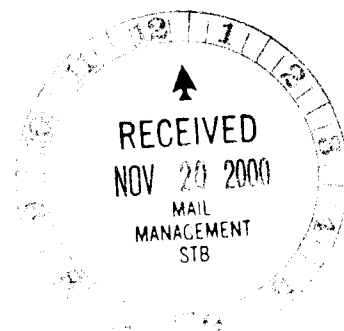
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**Public Record**

**STATEMENT  
of the  
ALLIANCE FOR RAIL COMPETITION**

**BEFORE THE SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 582 (Sub-1)**  
**Major Rail Consolidation Procedures**  
November 17, 2000



As part of the Ex Parte 582 (Sub No. 1) commenting process on the Advanced Notice of Proposed Rulemaking, the Alliance for Rail Competition (ARC) and other representatives of the rail customer community recommended a set of pro-competitive principles upon which the STB should base its new merger rules (attached). While the Board's proposed rules might be interpreted as consistent with these principles, there is little to indicate that these rules can or will achieve the stated goal of "balanced and sustainable competition in the railroad industry."

ARC appreciates that the pro-competitive rhetoric included in the proposed rulemaking reflects a "paradigm shift" in the Board's review of major mergers. However, this rulemaking can be judged only on the specificity of the rules themselves. Because the Board has provided no specific guidelines indicating how it would balance its stated goal of enhanced competition with the public benefits that, it suggests, resulted from past rail mergers, we do not find that the proposed rules live up to the spirit of the rail customer community's recommendations.

**THE QUESTION AT THE HEART OF THIS RULEMAKING IS WHAT IS IN THE  
BEST PUBLIC INTEREST**

In our view, the public interest requires a competitive rail system that provides consistent, reliable and safe service at a fair price to all who wish to use rail service. Such a system would play a major role in the nation's transportation system, alleviating highway congestion and reducing air pollution, and providing critical transportation services supporting and encouraging economic development and growth. When measured against such a standard, the rail system and the policies governing it—both existing and proposed—clearly do not meet the public interest standard:

**The past several "major" mergers have not significantly improved service,** enhanced competitive service alternatives for any but a select few, resulted in remarkably more efficient or more responsive rail transportation, or generally reduced the costs associated with rail transportation. Reams and reams of testimony have been submitted—in this proceeding and others—verifying the significant and lasting harms and limited benefits of recent, already approved mergers. While the Board may prefer to ignore the disastrous outcomes of previous mergers and focus only on future theoretical mergers, such an approach is unrealistic at best. "What's past is prologue," and to ignore such wisdom in this proceeding is contrary to the public interest.

**Increasing the discretion of the Board regarding how it balances the railroads' future merger proposals with the need for enhanced rail-to-rail competition will not likely improve the chances that any future merger will produce different results.** This approach only ensures that no one will truly know what the rules are until the next merger application is approved and we are well into an "end-game" scenario. A "rulemaking" should actually include rules, rather than broad-brushed subjective guidelines. To do otherwise is inconsistent with the public interest.

**No amount of regulatory monitoring will correct the harms caused by a merger that does not live up to expectations.** Certainly, once the damage has been done, it is difficult to undo. However, allowing the merged carrier to continue to operate essentially without any significant imposed consequences—as has been done in the past, and has been proposed under this rulemaking proceeding—is inappropriate and unacceptable.

**Service disruptions, regardless of their length, harm rail customers,** but they also result in significant losses to local, state and national economies through lost wages, lost tax revenues, lost sales and lost productivity; put more trucks on the road adding to highway congestion and air pollution; and generally lower the bar on expectations of rail performance. These economic consequences cannot be repaired, and run counter to the public interest. Furthermore, this cyclical pattern is one of the primary reasons why rail transportation captures less and less of an ever-expanding demand for freight transportation. The fact that the rail industry's service record is so poor and the cost to use rail transportation is so high—essentially discouraging the movement of freight by rail—also is contrary to the public interest.

**In the highly consolidated rail marketplace, it is imperative that the Board view any future mergers as an opportunity to increase competition between railroads throughout the rail industry under the auspices of its broad authority.** The Board's characterization of any increased competition as "a broad program of open access that would go beyond the public interest" is incorrect, and reinforces our perspective that this rulemaking will not achieve its stated objective of enhancing competition.

**Efforts to ensure that gateways remain physically open, but without specifically requiring that they remain economically open, provides little or no assurance that even existing competition will be maintained under these proposed rules.**

**To the extent that a rail customer can reasonably rely on another mode of transportation as an alternative to rail, the railroad industry may continue to provide an alternative transportation option regardless of the Board's merger policies.** However, for those customers that must rely solely on rail transportation—whether the reasons for that reliance are based on the bulk of the shipment, geography or safety—competition can only be enhanced through increased *rail* transportation options. Thus, at this stage in the rail industry's evolution, the public benefit is only served when policies intended to enhance competition—a.k.a. rail customer choice among carriers—are focused on enhancing rail-to-rail competition.

**The dwindling number of Class I railroads and the lack of competition among those few railroads remaining allows them to behave in ways that determine the viability of geographic markets.** No sufficient public benefit can offset the harm of mergers that allow railroads to maintain and even increase their market power. Aside from the myriad of service problems that have resulted in recent years, such increased market power frequently has allowed railroads to discourage and even prevent economic development, particularly in rural areas.

**The unreliability and inconsistency of rail service performance undermines rail transportation as a viable mode of freight movement, and as a result, contributes to the congestion of highways and associated air pollution in many urban areas of the country.** Again, this is inconsistent with the public interest.

In addition to the merger policy principles forwarded by many different groups as part of the ANPR process, ARC also forwarded a set of more specific recommendations upon which we believe sound public policy toward future railroad mergers should be based. Since the Board did not respond to the validity of these recommendations, ARC submits them again as the basis upon which actual, specific, definitive rules should be crafted:

**1. A Viable Freight Railroad Industry is in the Public Interest**

Freight railroads are national assets that have the ability to provide relatively low-cost, energy-efficient and environmentally benign transportation service. They operate with a public nature and responsibility. They have a duty to serve all of their customers—without whom they would cease to exist—without prejudice or discrimination. This principle is not reflected within the STB proposed rulemaking.

**2. Railroad Viability Can and Should be Enhanced With Competition**

The best means for ensuring the railroad industry's viability is to encourage carriers to compete among themselves, as well as with other modes of transportation. Competition is the engine that drives the free enterprise system. It pressures suppliers (railroads) to be efficient and can help railroads grow traffic. The STB proposed rulemaking is vague at best as to the appropriateness of enhancing rail-to-rail competition. Rail-to-rail competition should not be traded off for the alleged benefits of single-line service that are often identified in merger applications. Any merger that does not provide for increased competition among railroads should be viewed as contrary to the public interest.

**3. The Net Impact on Customers Should be the Key Merger Criterion**

Even where economies of density are expected to be realized, railroad mergers should not be approved if the prospective cost reductions are offset by adverse service and/or rate impacts on railroad customers due to a diminishment of competition. There has not been one merger yet that has anticipated within its application process adverse service or rate impacts, yet virtually all of the major mergers that have been undertaken in the past five years have resulted in just that. At some point experience must outweigh theory, yet the STB proposed rulemaking turns a blind eye to addressing actual net impacts. Simple monitoring of post-merger service failures is an insufficient agency response.

#### **4. Competitive Access is the Preferred Protection for Customers**

Railroad customers can be protected from the adverse effects of mergers, by providing for additional competitive access to captive customers served by the merged railroad, and/or by implementing effective economic regulation. Competitive access is preferable to regulation because it motivates carriers to be responsive to customer needs. Competitive access would benefit railroads in that the incumbents: (1) could charge adequate user fees, (2) would experience traffic growth, and (3) would in turn realize newly-found economies of traffic density.

As noted previously, any merger that does not address the need for increased competition *among railroads* is contrary to the public interest. The STB rulemaking does not adequately require increased rail-to-rail competition to result from future mergers, which in turn, will result in an increasing number of future disputes having to be resolved by regulators rather than a free and competitive market. A free and competitive market only exists where rail customers have the choice to take their business to another carrier, and the STB proposed rulemaking does nothing to encourage such a market to emerge for rail customers that cannot turn to another mode of transportation.

#### **5. Railroad Customers Need Safe Harbor Protection**

In the absence of effective railroad competition, economic regulation is necessary to insure that service is adequate and freight rates are reasonable. Opening access and economic regulation is not an either-or choice; they are parts of a whole. The STB proposed rulemaking ignores this principle, preferring instead to offer up subjective guidelines that allows regulators to arbitrarily pick and choose among merger applicants based on perceived public benefits that may not ever appear, and with no indication that any post-merger consequences would ever be applied.

#### **6. Railroad Mergers Are Not the Only Way to Lower Operating Costs**

Traffic growth is a key to economies of railroad track density. Aside from traffic growth, railroads can reduce costs through a wide variety of managerial and technological means. Railroads have controlled their costs by eliminating inefficient service, reducing crew sizes, changing operating and work rules, and employing new technology. Many have recognized that the opportunity for future mergers to reduce these kinds of costs is past. Outside of "growing" traffic by buying the traffic of a second carrier, mergers are not likely to produce traffic growth. Rather, an emphasis on improving service quality and reliability, offering new services to meet customer needs, and identifying innovative ways to operate more quickly and efficiently paired with improved efforts at customer relations and marketing will result in traffic growth. None of that is likely to be achieved through mergers. Alliances are a tool that have been used in the past to get the operating efficiencies that often come with mergers. Such an approach is likely favorable to an irreversible merger situation, but alliances should not be exempt from STB scrutiny. As with mergers, alliances should not be allowed to constrain customer choice, and in fact, should be seen as an opportunity to expand customer choice. These issues are not adequately addressed by the STB proposed rulemaking.

#### **7. Post-Merger Performance Must be Closely Monitored**

The STB should establish procedure to measure post-merger performance and should issue an annual report of its findings for a period of 10 years. While the proposed rulemaking

includes post-merger monitoring, it merely formalizes what the Board has already been doing in previous mergers—monitoring mergers for five years. However, we are already seeing that a five-year period is insufficient, particularly since post-merger service disruptions often take practically that long to resolve. Some past mergers have yet to produce the anticipated benefits, and such results should be exposed through a monitoring process. Furthermore, monitoring should not be limited to whether trains are running within some subjectively determined performance parameters. Rather, the competitive impacts of a merger should be taken into account. The loss of competition among railroads is not in the public benefit, and ensuring that existing competition is *not harmed* and, in fact, that competition among railroads *is enhanced*, should be a priority in any post-merger monitoring.

#### **8. Where Desirable, Adjustments Should be Made**

When railroad mergers cause unanticipated adverse impacts on customers, or competitive alternatives provided for within a merger proceeding are determined to have either not worked or disappeared, the situation can be rectified *post merger* by opening competitive access and/or making economic regulation more effective. If a merger applicant indicates that a proposed merger will offer service benefits and can be implemented without service problems, then that applicant should be held to those promises. If no consequences other than monitoring are likely to be imposed, there is little reason for the merger applicant to expose, or even consider, the potential flaws of the transaction.

#### **Conclusion:**

The sheer lack of competition among railroads, not to mention the growing body of evidence of market power misuse and abuse, should be sufficient to indict the existing regulatory framework as failing to meet the public interest standard. Although the Board recognizes its broad authority under the merger-related portion of the statute, it is apparent from this proposed rulemaking that such authority is not likely to be appropriately exercised to achieve the public benefits that would result from increased competition among railroads. Therefore, ARC will call even more insistently upon Congress to undertake a complete overhaul of the existing regulatory framework in order to introduce and expand competition among railroads.

In the meantime, ARC believes the STB should either incorporate these recommendations fully into its final merger rules, which should be far more specific than the existing subjective framework, or specifically respond as to why these principles should be excluded. The Notice of Proposed Rulemaking does little more than summarize the comments of ARC and other rail customer representatives. As noted earlier in these comments, the railroad industry would cease to exist without the rail customer community, yet the views and perspectives of the rail customer community have been largely discounted and even ignored by the STB. At a minimum, the rail customer community deserves the respect of a direct reply from the STB to our recommendations and to the reasons for the vast discrepancies between the Board's and the rail customer community's respective estimation of the public benefits of mergers, both past and future.

**Attachment #1:**

Some organizations representing specific segments of the rail customer community have chosen not to submit comments in this rulemaking proceeding due to the burdensome nature of the party of record service requirement. However, some of those organizations have requested that they be formally referenced in the Alliance for Rail Competition's statement as endorsing the comments forwarded within this document. Those organizations that have specifically requested to be listed as endorsing the attached comments are listed below:

**National Council of Farmers Cooperatives**

50 F Street, N.W.  
Suite 900  
Washington, DC 20001  
202-626-8700  
Contact: Jay Howell

**National Farmers Union**

400 N. Capital Street, NW  
Washington, DC 20001  
202-314-3109  
Contact: Jim Miller

**PRINCIPLES FOR REFORM OF MERGER PROCEEDINGS  
AND RELATED REGULATION**

Upon review of the statements filed in Ex Parte No. 582 (Sub-No. 1), many members of the rail customer community recognize our growing consensus on issues raised by the concentration of railroad market power in the U.S. and the danger of the emergence of two huge monopoly railroads in North America. Our consensus is reflected in the following pro-competitive principles, which should guide the Surface Transportation Board in its development of improved policies and procedures:

Stronger action must be taken to hold merging railroads accountable for their promises of improved service and more efficient operations.

The severe service problems that have resulted from past railroad mergers must be prevented and/or mitigated through effective remedies, including performance guarantees, compensation and access to other railroads.

Current regulatory policies, including the bottleneck decision, the “one-lump” theory, and the “2-to-1” rule, have failed to prevent the reduction of competition among major railroads, which now enjoy unprecedented market power.

The regulatory policies of the past, which the STB has recognized as inadequate and which even many railroads are now recognizing as flawed, should be replaced by new policies aimed at promoting competition.

Access remedies such as trackage rights and switching on fair and economic terms should be more readily available, whether or not there are future mergers.

Contractual and operational barriers to competition from smaller railroads should be eliminated or reduced, whether or not there are future mergers.

Gateways for all major routings should remain open on reasonable terms.

Adverse impacts of rail consolidations on the safety of rail operations and on the interests of rail labor should be mitigated.

Cross-border mergers should not interfere with effective regulation and the enhancement of competition; and

Railroad mergers can no longer be considered in isolation.

The need for improved and enhanced competition along these lines is so strong and immediate that the STB should use the full extent of its authority to revise its policies consistent with these principles. The Board’s efforts in Ex Parte No. 582 (Sub-No. 1) should include, but not be limited to, all of the recommendations in the proceeding that would:

Increase competition among railroads;

Improve service and safety; and

Address any problems or flaws—present or future—that result directly or indirectly from rail mergers.

Recognizing that the Board may not have the necessary authority to fully achieve comprehensive policy reform consistent with all of the above-listed principles, the rail customer community will continue to press for congressional action that would provide the necessary legislative direction to achieve these principles.

Submitted by:

Diane C. Duff

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Washington, DC 20036  
PH: 202-216-9270  
diane@railcompetition.org

11/17/2000

Date:

### **CERTIFICATE OF SERVICE**

I hereby certify that this statement of the Alliance for Rail Competition has been duly served on all Parties of Record identified on the Ex Parte 582 (Sub-1) service list via first class mail in the United States Postal Service this 17<sup>th</sup> day of November, 2000.

Melissa M. Hemphill

Melissa M. Hemphill  
Alliance for Rail Competition